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Supreme Court, U.S.
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No. 98-366

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DAVID R. MCKUNE, Warden,
CHARLES SIMMONS, Secretary of Corrections,

Petitioners,

vs.

MARK L. STELTZLEN,

Respondent.

**MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

The Respondent asks leave to file a Brief in Opposition to Petitioner's petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[ x ] Respondent has previously been granted leave to proceed *in forma pauperis* in the following court(s):

District Court of Leavenworth County, Kansas
Court of Appeals of the State of Kansas

[ ] Respondent has not previously been granted leave to proceed *in forma pauperis* in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Mark Steltzlen
Mark Steltzlen

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19 pp

**AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Mark L Steltzlen, am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes _____ No X

   If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes _____ No X

   If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account?

   Yes _____ No X

   If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No X

   If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I declare under penalty of perjury that the foregoing is true and correct.
Executed on September 22, 1998.

Mark L Steltzlen
Mark. L. Steltzlen

## El Dorado Correctional Facility

## Certified Trust Fund Account Statement

I certify that the amount given below is the lesser of a) the inmate's average account balance or b) the total deposits, for the last six months or lesser period. Attached to this document is a certified copy of the inmate's trust fund account statement for the past six months.

$ 117.10

Inmate's Name Mark Steltzlen 52151

Signature of Authorized Officer B Posey

El Dorado Correctional Facility - Inmate Accounts

Date 9/10/98

No. 98-366

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v.

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Respondent.

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# BRIEF IN OPPOSITION

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## STATEMENT OF THE CASE

A. The State Regulations

At the time of Respondent's criminal behavior in this case, the State of Kansas sentenced offenders by a system of indeterminate punishment. The two critical dates in determining the actual release of a prisoner were his parole eligibility date, the first date the individual might be permitted to be released on parole, (K.S.A. 22-3717), and the inmate's conditional release (CR) date, the date on which the inmate was required to be released by the Department of Corrections.[1] (K.S.A. 22-3718). Both the PE and CR dates were affected by the award of "good time."

Regulations governing the issuance of good time were issued by the Department of Corrections. The complex set of regulations applicable to Respondent are discussed at length in the Court of Appeals Decision. *See* Pet. App. at 4a-10a. These regulations, under Kansas law, have the force and effect of statute. *See* K.S.A. 77-425.

Under the regulations in effect when Respondent committed his crime, good time for parole eligibility was computed differently than from conditional release. The applicable administrative regulation (K.A.R. 44-6-108 (1989)) stated, in part:

> (B) To establish eligibility for parole in certain cases amenable to reduction by good time credits, good time credits, as earned, shall be awarded to reduce the time required to be served on the minimum term of those sentences as described in these regulations....
> (C) To establish the conditional release date, good time credits, not forfeited, shall be presumed earned and shall be applied to the maximum sentence term when first computed.

---

[1] In the period of time between the inmate's parole eligibility and conditional release dates, the inmate was subject to jurisdiction of the Kansas Parole Board. K.S.A. 22-3717.

Kansas Administrative Regulation 44-6-113 provided that:

> "In determining parole eligibility...good time credits shall not be awarded in advance of earning or on a projected basis. Good time credits shall be awarded only after the inmate has been deemed, by the unit term, to have earned them.

Kansas Administatrative Regulation 44-6-124(a) provided standards to be used by unit teams in deciding whether to award or withhold good time credits for purposes of parole eligibility. Those regulations provided for withholding for disciplinary offenses, and also provided discretion for the unit team to issue credits, based upon "good work, behavior, and on other performance factors related to effective rehabilitation of the inmate."

In contrast, the regulations governing conditional release provided that "It shall be presumed, when computing conditional release, that 100% of the available good time credit is earned and the good time credit shall be applied on a projected basis." Pet. App. 5a.

In addition to these sections governing awarding and withholding of good time, a separate provision governed forfeiture of good time already earned. That provision stated:

> Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date.

K.A.R. 44-6-125(b)(1989).

When read together, the above sections required that good time credits toward parole eligibility were awarded by the unit team after each review period only to the extent deemed earned and were applied to the inmate's minimum sentence to establish a progressively nearer parole eligibility date. In contrast, an inmate's conditional release date was set based upon the presumption that all credits had been earned. "Standards for awarding good time to conditional

release were not supplied because they were not needed--all available good time credits were awarded at the outset for purposes of conditional release..." Pet. App. at 7a-8a. In addition, while good time could be forfeited for disciplinary infractions, forfeitures affected only the parole eligibility date before the date was reached. Only after parole eligibility was reached could good time be forfeited on an inmate's conditional release date. *Id.*

B. The Amended Regulations

On January 3, 1995, the Department of Corrections amended its regulations concerning the award of good time. The amended regulation provides:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credit shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1996 Supp.) (emphasis added).

C. Application of These Regulations

Respondent Mark Steltzlen was incarcerated in 1990, on a sentence of 15-20 years. Pursuant to the regulations then in force, Respondent was awarded 100% of the available good time credits applicable to his conditional release. The credits were presumed earned and applied on a projected basis, giving him a conditional release date of May 17, 2000. Prior to 1995, no awards and forfeitures of good time with respect to Respondent's parole eligibility date changed this conditional release date. Pet. App. 8a-9a.

After March 1, 1995, the Department of Corrections "converted over" to applying the new system of applying credits toward Respondent's conditional release. He was credited, at that

time, with all good time "accumulated" up to 1995. When the conversion was completed, his release date was extended from May 2000 to August 2005. At subsequent review proceedings, Respondent was awarded good time on several occasions. However, prior to Respondent's parole eligibility date of November 17, 1997, Respondent allegedly engaged in disciplinary misconduct which caused a forfeiture of 90 days of good time. In addition, the unit team, which was responsible for the discretionary award of good time, awarded 60 days of good time and forfeited 60 days of good time at its review period. Prior to 1995, neither the forfeiture nor the withholding of good time could have been applied to Respondent's conditional release date. Ultimately, the warden canceled the forfeiture of good time, leaving Respondent with a 60 day withholding imposed by the unit team that retaded his conditional release date. Pet. App. at 100.

D. The Litigation in This Case

Respondent filed a habeas corpus actions within the state courts, which challenged the application of the amended regulations to him as a violation of the Constitution's prohibition on Ex Post Facto laws. The district court agreed with his position, and ordered the withheld good time restored to him. On appeal, the Court of Appeals agreed with Respondent and affirmed the ruling of the district court in an unpublished opinion. *Steltzlen v. McKune*, (No. 77,897)(Kan. Ct. App. Sept. 5, 1997).

After describing in detail the regulations affecting good time, the Court turned to whether the retroactive changes in the regulations constituted a violation of the Ex Post Facto Clause. Quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981), the Court noted that the critical elements that must be present for a criminal or penal law to be ex post facto are that it "apply to events

occurring before its enactment, and it must disadvantage the offender affected by it." Pet. App. at 14a.

The Court first found that the administrative regulation issued by the Department of Corrections constituted laws for purposes of the Ex Post Facto Clause. The Court relied upon the fact that, in Kansas, administrative regulations have the force and effect of statute (K.S.A. 77-425), and "as in the case of statutes will be construed to operate prosecutively unless a contrary intent is clearly indicated." Pet. App. 15a.[2]

Relying upon *Weaver*, the court next determined that the provision was retrospective in operation. The Court noted that at the time Steltzlen committed his crimes, the regulations in question granted him automatic award of good time for his conditional release which could only be taken for misconduct, and then, for misconduct occurring after his parole eligibility date. The amended regulations, in contrast, required Respondent to meet additional obligations determinable at the discretion of prison officials. The Court found the change analogous to the retrospective changes involved in *Weaver,* where a Florida law had lessened the number of automatic good time credits that had previously been available under Florida law.

The Petitioner sought review from the Kansas Supreme Court, and the Court, without opinion denied review.

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[2]Although we agree with Petitioner that the determination of *when* an administrative regulation constitutes a "law" for Ex Post Facto purposes may not always be crystal clear, we disagree with Petitioner's implicit contention that there is a conflict among courts concerning *whether* administrative rules can constitute laws for Ex Post Facto purposes.

## REASONS FOR DENYING THE WRIT

The unpublished and unanimous opinion in this case, an opinion that was not questioned by a single judge of the Kansas Supreme Court in the Petition for Review, is an inappropriate vehicle for a full-scale re-examination of Ex Post Facto Doctrine. This would be the case even if this Court had not taken the time, as it did only last year in *Lynce v. Mathis*, 117 S.Ct. 891, 895 (1997), to address some of the very questions that Petitioner seeks to have examined. Because this case does not break any new ground, because it faithfully applies Supreme Court and lower-court opinion, and because it turns on State law issues which this Court should not disturb, we respectfully submit that the Court should deny certiorari.

1. The lynchpin of Petitioner's argument is its assertion that there is a conflict in the lower courts over whether "regulations affecting inmates" are "laws" for purposes of Ex Post Facto analysis, and in particular, whether Ex Post Facto provisions can apply to prison or parole regulations. (*See* Petition for Certiorari at 11, referring to Petitioner's arguments in *Hannigan v. Stansbury*, No. 98-367, and *Simmons,et al. v. Bankes*, No. 98-367). With the greatest respect, we do not believe that these assertions fairly portray the views of the federal court. Rather, we believe that while the question of *when* an administrative regulation violates Ex Post Facto may sometimes be difficult, there is no serious dispute *whether* administrative regulations promulgated in the exercise of delegated legislative power can be laws for purposes of Ex Post Facto analysis.

As a matter of logic, a decision that administrative regulations could not be "laws" for Ex

Post Facto purposes would be strange, indeed. The Ex Post Facto clause stands to place limits on the "sovereign's ability to use its law-making power to modify bargains it has made with its subjects." *Lynce v. Mathis,* 117 S.Ct. 891, 895 (1997). A system that exempted administrative regulations from scrutiny under the Ex Post Facto clause would permit legislatures to avoid application of the Ex Post Facto clause and to alter bargains, by the simple expedient of delegating legislative power to an administrative agency, and then leaving it to that agency to write retrospective rules.

Each and every circuit has, in fact, taken the position that an administrative agency exercising delegated legislative power can issue regulations constituting "law" affecting prisoners for Ex Post Facto purposes. That is the basis for holding that revised and more onerous guidelines, issued by the United States Sentencing Commission, cannot be applied to inmates whose criminal conduct occurred before issuance of the guidelines.[3] Not only has this position been adopted by all of the circuits, it is the assumption of the Commission itself, which has written a policy statement concerning how sentencing courts should apply the sentencing guidelines, when application of the guideline extant at the time of sentencing might violate the Ex Post Facto clause. *See* U.S.S.G. §1B1.11. And, obviously, such regulations can have an Ex Post Facto effect even though the Commission has no power to change the minimum or

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[3]*See United States v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *United States v. Young*, 932 F.2d 1035, 1038n.3 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779, 782-83 (4th Cir. 1991); *United States v. Suarez*, 911 F.2d 1016, 1022-23 (5th Cir. 1990); *United States v. Nagi*, 947 F.2d 211, 213n.1 (6th Cir. 1991), *cert. denied,* 504 U.S. 958 (1992); *United States v. Seacott*, 15 F.3d 1380 (7th Cir. 1994); *United States v. Bell*, 991 F.2d 1445 (8th Cir. 1993); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991); *United States v. Mondaine*, 956 F.2d 939 (10th Cir. 1992); *United States v. Worthy*, 915 F.2d 1514, 1516n.7 (11th Cir. 1990); *United States v. Green*, 952 F.2d 414 (D.C. Cir. 1992), *cert. denied,* 503 U.S. 1010 (1992).

maximum sentence imposed by the legislature for the particular offense. In sum, contrary to the argument of Petitioner, there is universal agreement within the federal courts that administrative regulations affecting an inmate's actual term of imprisonment can constitute laws, within the meaning of the Ex Post Facto clause.

2. While the issue of *whether* an administrative regulation can constitute a law for Ex Post Facto purposes is, contrary to Petitioner's assertion, relatively clear, we have no dispute that the question of *when* such a regulation is a law is less settled. For a number of reasons, however, this case is an exceedingly poor vehicle to resolve such an issue.

At the outset, we doubt whether any magic and universal rule can be adopted to resolve the question. Administrative agencies are not all of a type; some, like the United States Sentencing Commission, clearly "make law"--others may only be empowered to issue rules to regulate discretion and policy in the "execution" of laws. *See generally, Prater v. United States Parole Commission*, 802 F.2d 948, 953 (7th Cir. 1986)(en banc).

In making the sensitive determination of whether a state agency's rules are "laws" for purposes of the Ex Post Facto clause, prudential considerations argue for deference to the State's own characterization of its administrative rules. In this case, for example, the Kansas Court of Appeals held that the regulations were "laws" for purposes of Ex Post Facto in reliance on the fact that, under K.S.A. 77-425, such regulations have, in our state, the force of statute. The Court of Appeals also relied appropriately upon cases that held that "as in the case of statutes" such regulations should generally be construed to operate prospectively. *See* Pet. App. at 15a.

While Petitioner argues that the Court of Appeals decision would not provide "any limit

to the reach of the Ex Post Facto Clause in the prison context" (Pet. Br. at 13), examination of Kansas Regulatory Law reveals that Petitioner is almost certainly incorrect. Kansas Statutes Annotated 77-415, the statute defining the regulatory authority of state agencies in Kansas, exempts from its formal rulemaking process rules relating to the "internal management of the agency" and rules relating to "emergency or security procedures of a correctional institution." Thus, security rules that might have an incidental, but detrimental effect on inmates, are not compassed by the Court of Appeals decision. Even less affected by the decision are the manuals, running hundreds of pages, issued by the Department of Corrections dealing with prison policy. *See* IMPP Program Manual (1998). Our Legislature, Administrative Agencies, and courts have been able to separate those administrative pronouncements that constitute "laws" from those that regulate discretionary policy. The attention of the Supreme Court of the United States to this issue, we most respectfully submit, is not required. Similarly, Petitioner's argument that the Ex Post Facto clause should not be applied because the Department of Corrections's original 1979 regulations concerning good time was "contrary to the plain statutory language" and provided an "unwarranted benefit" to inmates is a question of State law which was not resolved in Petitioner's favor during the proceedings in the Kansas Court of Appeals . *See* Pet. App. at 19a (describing amended regulations as "arguably" better at fulfilling the legislative directive).

3. The decision of the Court of Appeals is an appropriate interpretation of this Court's prior Ex Post Facto precedents. In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court resolved an Ex Post Facto challenge involving a question almost identical to the one in this case--whether Florida's retroactive reduction in gain time credits violated the Ex Post Facto Clause. The

Florida system reduced the number of monthly gain time credits awarded to an inmate who "abides by prison rules and adequately performs his tasks." 450 U.S. at 33. At the same time, however, the law was changed to increase the number of "special" gain time credits which could be earned for performing conscientious or outstanding work. This Court rejected Florida's argument that the possibility of extra gain time for outstanding work negated the Ex Post Facto violation caused by the reduction in gain time. The Court stated:

> But none of these provisions for extra gain time compensates for the reduction of gain time available solely for good conduct. The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision than he could for the same conduct under the new provision....*Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate*... 450 U.S. at 35 (citations omitted)(emphasis added).

It is not surprising that the Court of Appeals held the change in the award of good time in Kansas analogous to the change in Florida. Indeed, the similarities are stark. Prior to the change in good time rules, Respondent was awarded all statutorily available good time. That good time was defeasible only for misconduct, and even then, only for misconduct occurring after his parole eligibility date. After the change, the award of good time for conditional release was contingent on the discretion of his unit team. Even if Respondent engages in no misconduct, he is not assured an award of good time under this new regulation. *See* Pet. App. at 18a-19a.

4. On page 12 and 13 of its Brief, Petitioner faults the Court of Appeals decision for relying almost exclusively upon *Weaver v. Graham, supra.* Indeed, the Court of Appeals decision cites and relies heavily upon *Weaver, supra,* and *Lynce v. Mathis,* 117 S. Ct. 891 (1997). Since those cases are the two Supreme Court precedents that deal directly with the question of

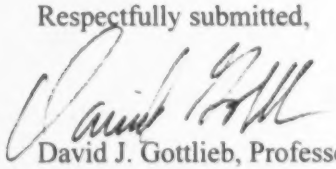
whether the reduction or revocation of credits against sentence violates the Ex Post Facto clause, and since neither of the two cases provoked even a single Justice to dissent, we fail to see why the Court of Appeals should be faulted for its choice.

5. Finally, we recognize that Petitioner has tied together their Petition in this case with Petitions in two other cases, *Hannigan, et al. v. Stansbury, supra,* and *Simmons, et al. v. Bankes, supra. Stansbury* deals with the question of whether the failure to credit good time for purposes of *parole eligibility*, as a result of a different amendment to the Administrative Regulations, passed in 1993, violates the Ex Post Facto clause. In *Stansbury* and *Bankes,* the inmates were subject to withholding of good time as a result of their refusal to participate in a Sex Offender Treatment Program. While the validity of the 1995 amendment that is the heart of this case is raised in the above petitions, we note that the Kansas Supreme Court's consideration of the conditional release issues in *Stansbury* and *Bankes* is not central to its analysis. We also note that even if this Court accepts certiorari and resolves the Ex Post Facto questions in these two cases, the validity of the State's Sex Offender Treatment Program will still be in question. In an unrelated, but significant case, the United States District Court of the District of Kansas has just held unconstitutional aspects of the current implelmentation of the Sex Offender Treatment Program, on the ground that it requires compulsory self-incrimination in violation of the Fifth Amendment. *Lile v. McKune,* 1998, U.S. Dis. Lexis 15102 (D. Kan. Sept. 16, 1998). Thus, even if the Court accept certiorari to deal with the Ex Post Facto issues, the validity of the Sex Offender Treatment Program will not be finally resolved.

## CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and correct copy of the foregoing Brief in Opposition by depositing the same in the United States Mail, first class postage prepaid on this 19th day of October, 1998, addressed to:

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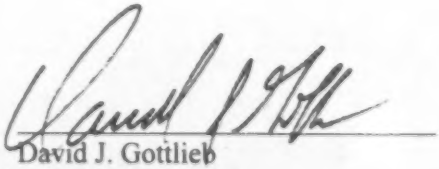

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